IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

BRIEF FOR ALEXANDER J. BARKET AS AMICUS CURIAE

VERYL L. RIDDLE
THOMAS C. WALSH
ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102
Attorneys for *Amicus Curiae*

BRYAN, CAVE, McPHEETERS & McROBERTS
LEVY & CRAIG
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Question Presented 1

Interest of the Amicus Curiae 2

Argument 4

An order overruling a plea of double jeopardy is appealable as a "final" order under 28 U.S.C. § 1291 4

A. The concept of "finality" 4

B. The nature of double jeopardy 7

C. The finality rule as applied to double jeopardy 9

Conclusion 13

Cases Cited

Ashe v. Swenson, 397 U.S. 436 (1970) 3, 11, 12

Breed v. Jones, 421 U.S. 519 (1975) 8

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) ... 4

Carroll v. United States, 354 U.S. 394 (1957) 7

Cobbledick v. United States, 309 U.S. 323 (1940) 5, 6, 7

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949) 4, 5

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) .. 4

DiBella v. United States, 369 U.S. 121 (1962) 7

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950) 5

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 4, 5

Gillespie v. United States Steel Corporation, 379 U.S. 148 (1964) 5
Gilmore v. United States, 264 F. 2d 44 (5th Cir. 1959) ... 9
Green v. United States, 355 U.S. 184 (1957) 7
Harris v. Washington, 404 U.S. 55 (1971) 11
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) 12
Mills v. Alabama, 384 U.S. 214 (1966) 6
Parr v. United States, 351 U.S. 513 (1956) 7
Perlman v. United States, 247 U.S. 7 (1918) 5
Rankin v. State, 11 Wall. 380 (1870) 12
Robinson v. Neil, 409 U.S. 505 (1973) 8
Stack v. Boyle, 342 U.S. 1 (1951) 6
Swift & Co. v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950) 4
Thomas v. Beasley, 491 F. 2d 507 (6th Cir. 1974), cert. denied, 417 U.S. 955 (1974) 9
Turner v. Arkansas, 407 U.S. 366 (1972) 12
United States ex rel. Russo v. Superior Court, 483 F. 2d 7 (3d Cir. 1973), cert. denied, 414 U.S. 1023 (1973) ... 9
United States ex rel. Stewart v. Hewitt, 517 F. 2d 993 (3d Cir. 1975) 9
United States ex rel. Webb v. Court of Common Pleas, 516 F. 2d 1034 (3d Cir. 1975) 9
United States v. Bailey, 512 F. 2d 833 (5th Cir. 1975) ...9, 10
United States v. Ball, 163 U.S. 662 (1896) 7
United States v. Barket, 530 F. 2d 181 (8th Cir. 1975) 3, 9, 10
United States v. Beckerman, 516 F. 2d 905 (2d Cir. 1975) 9

United States v. DiSilvio, 520 F. 2d 247 (3d Cir. 1975), cert. denied, — U.S. — (1975) 9
United States v. Jorn, 400 U.S. 470 (1971) 8
United States v. Lansdown, 460 F. 2d 164 (4th Cir. 1972) 9
United States v. Lasater, — F. 2d — (8th Cir. 1976) 10
United States v. MacDonald, 531 F. 2d 196 (4th Cir. 1976) 9
United States v. Nixon, 418 U.S. 683 (1974) 4, 7
United States v. Ryan, 402 U.S. 530 (1971) 7
United States v. Starks, — F. 2d — (3d Cir. 1976) 9
United States v. Wilson, 420 U.S. 332 (1975) 7

Miscellaneous Cited

9 Moore, Fed. Prac. ¶ 110.10 5
18 U.S.C. § 610 ..... 2, 3
18 U.S.C. § 656 .....2, 3, 10
28 U.S.C. § 1257 ..... 5, 6
28 U.S.C. § 1291 .....4, 5, 6, 9
Judiciary Act of 1789, Sections 21, 22 and 25 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-6521

DONALD ABNEY, LARRY STARKS and
ALONZO ROBINSON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

BRIEF FOR ALEXANDER J. BARKET AS AMICUS CURIAE

This brief is being filed on behalf of Alexander J. Barket as *amicus curiae* with the consent of all parties. Pursuant to Rule 42, the written consents of counsel for each party have been lodged with the Clerk.

QUESTION PRESENTED

The government in its Memorandum in response to the Petition for Certiorari raised a question not posed by petitioners:

whether a pre-trial order refusing to dismiss an indictment on double jeopardy grounds is an appealable order. This brief is limited to a discussion of that question.

INTEREST OF THE AMICUS CURIAE

Alexander J. Barket, *amicus* herein, is the petitioner in No. 75-1280. Because of the important jurisdictional question presented in the instant case and in *Barket*, the United States acquiesced in the Petition for Certiorari in both cases. Alternatively, the government suggested that the Court might wish to grant in *Abney* and to defer consideration of *Barket* until final resolution of *Abney*. The Court has apparently adopted the later course inasmuch as the petition in *Barket* has not been acted upon.

Amicus was tried before a federal district judge, without a jury, on one count of a two-count indictment arising out of a single incident. In the count which was tried, he was alleged to have misapplied bank funds under 18 U.S.C. § 656 "for the purpose of making an unlawful political contribution." He was acquitted of that charge, and the trial judge specifically found, *inter alia*, that there was a "failure of proof on the part of the government that the purpose of the defendant's action was the making of an illegal political contribution."

Following that acquittal, the government sought to try *amicus* on the remaining count of the indictment, which charged him with consenting to an illegal political contribution under 18 U.S.C. § 610. The incident forming the nucleus of the remaining count was exactly the same transaction upon which the earlier charge had been based, and the government has stipulated that it intends to use precisely, in all respects, the same evidence at the trial of the § 610 charge that was offered at the previous trial.

Amicus moved to dismiss the remaining count of the indictment on the grounds, *inter alia*, of double jeopardy and collateral estoppel.[1] That motion was denied by the district court, and *amicus* appealed to the Eighth Circuit. The Court of Appeals held that it had jurisdiction of the appeal but ruled against *amicus* on the merits of his fifth amendment claim. *United States v. Barket*, 530 F. 2d 181 (8th Cir., Dec. 9, 1975). It is that ruling which is being challenged in No. 75-1280.

The key jurisdictional issue raised by the government in its Memorandum in the instant case is identical to that in No. 75-1280, and the disposition of *amicus*' Petition will be vitally affected by the ruling in the instant case.

---

[1] The prosecutor had previously conceded on at least two occasions that an acquittal on the § 656 charge would bar trial of the § 610 count under the principles of *Ashe v. Swenson*, 397 U.S. 436 (1970).

ARGUMENT

An Order Overruling a Plea of Double Jeopardy Is Appealable as a "Final" Order Under 28 U.S.C. § 1291

A. The Concept of "Finality."

The threshold question in this case is one that has troubled this Court and others on many occasions, *i.e.*: when is a decision "final" and hence appealable under 28 U.S.C. § 1291?[2] The finality requirement has deep roots which can be traced back to the Judiciary Act of 1789.[3] It reflects a well-considered policy "against piecemeal reviews and against obstructing and impeding an ongoing judicial proceeding by interlocutory appeals." *United States v. Nixon*, 418 U.S. 683, 690 (1974). Nevertheless, this Court has repeatedly emphasized that § 1291 does not restrict appellate review only to those judgments which finally terminate a lawsuit but, rather, that the concept of finality must be given a "practical rather than a technical construction." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170-71 (1974); *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); *Swift & Co. v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

The determination of finality *vel non* in a specific context is frequently a challenging one, and the guidance afforded by precedent is often only dimly perceptible and occasionally dis-

---

[2] Section 1291 provides:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

[3] Sections 21, 22 and 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85.

cordant. Essentially the process requires a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *Eisen v. Carlisle & Jacquelin*, *supra* at 171.

Significantly, § 1291 does not speak in terms of "final judgments" but rather of "final decisions."[4] Congress contemplated that a given ruling could be final for all practical purposes even though the case itself had not been concluded. The landmark decision in *Cohen v. Beneficial Industrial Loan Corporation*, *supra*, accordingly recognized a "small class" of orders which should be considered "final" if they have three characteristics: (1) they must finally determine claims of right "separable from and collateral to" rights asserted in the action; (2) the right must be too important to be denied review; and (3) review cannot await final judgment because by that time the claimed right will have been lost, probably irreparably. See 9 MOORE, FED. PRAC. ¶ 110.10. In *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964), *Cohen* was interpreted to mean that a collateral order should be deemed "final" if it was "fundamental to the further conduct of the case."[5]

The *Cohen-Gillespie* rationale has also been applied in criminal cases where the right being asserted would be frustrated or mooted in the absence of prompt review. Almost 60 years ago in *Perlman v. United States*, 247 U.S. 7 (1918), the Court permitted an appeal from an order requiring the compulsory production of documents before a grand jury. Discussing *Perlman*

---

[4] Compare § 1257, which governs review by this Court of "final judgments or decrees rendered by the highest court of a state in which a decision could be had."

[5] To the same effect is the statement in *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940), that the absolute requirement of finality should be departed from "when observance of it would practically defeat the right to any review at all."

in his opinion for the Court in *Cobbledick*, 309 U.S. at 328-29, Mr. Justice Frankfurter noted the underlying basis for the ruling:

> "To have held otherwise would have rendered Perlman 'powerless to avert the mischief of the order . . .' 247 U.S. at 13. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. *To have denied him the opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.*"[6]

In *Stack v. Boyle*, 342 U.S. 1 (1951), the Court employed the *Cohen* analysis and determined that an order denying a motion to reduce bail was "final" under §1291 even though the underlying action was obviously far from concluded. The decision in *Mills v. Alabama*, 384 U.S. 214 (1966), is also instructive, although it dealt with "finality" under §1257. There it was held, *l.c.* 219, that an order overruling a demurrer to a criminal complaint was "final" where the charge was based upon an "obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." Prompt review of a clear-cut constitutional violation and prevention of an illegal trial were deemed necessary to obviate "a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." Such considerations are uniquely apposite to the present context.

---

[6] Emphasis ours here and throughout this brief except where otherwise indicated.

Most recently, in *United States v. Nixon*, 418 U.S. 683 (1974), the Court ruled that the denial of a motion to quash a third-party subpoena issued to the President of the United States in connection with a criminal investigation was "final" because "denial of immediate review would render impossible any review whatsoever of an individual's claims," citing *United States v. Ryan*, 402 U.S. 530, 533 (1971).

The foregoing criminal cases recognizing the "finality" of certain orders should be compared with such decisions as *United States v. Ryan*, 402 U.S. 530 (1971); *DiBella v. United States*, 369 U.S. 121 (1962); *Carroll v. United States*, 354 U.S. 394 (1957); *Parr v. United States*, 351 U.S. 513 (1956); and *Cobbledick v. United States*, *supra*. When all these cases are sifted and weighed, it becomes apparent that the *ratio decidendi* of any "finality" determination is whether the right being asserted will be seriously and irreparably damaged if immediate review is not had. The finality rule should not be applied in such a manner as to render appellate review an empty ritual.

B. **The Nature of Double Jeopardy.**

The Fifth Amendment provides in relevant part that:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The constitutional protection against double jeopardy derives from the English common law and is designed to insulate an accused against repetitive or successive prosecutions for the same alleged crime. *United States v. Wilson*, 420 U.S. 332 (1975). The prohibition not only applies to a second punishment but also forbids a second trial, whether the accused was acquitted or convicted at the first trial. *United States v. Ball*, 163 U.S. 662 (1896). In *Green v. United States*, 355 U.S. 184, 187-88 (1957), Mr. Justice Black noted the genesis and the intendment of the double jeopardy clause:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, *thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*"[7]

The double jeopardy clause decrees that once a man has been tried for a given crime, there can be no second trial on that charge. He is constitutionally entitled to be spared the ordeal, stress and "heavy personal strain" which necessarily inhere in the defense of any criminal prosecution. *Breed v. Jones*, 421 U.S. 519 (1975). The double jeopardy right, then, is *sui generis*—it is different in kind, rather than in degree, from other constitutional entitlements because it proscribes the trial itself. Yet, in the instant case as well as in *Barket*, the government has vigorously sought to block prompt appeal of the double jeopardy question by the superficial assertion that opening a crack for immediate resolution of double jeopardy questions will encourage a flood of interlocutory appeals raising other constitutional issues. That simply is not so because of the distinctive nature of double jeopardy. No other constitutional safeguard stands on the same footing or serves the same purpose. In *Robinson v. Neil*, 409 U.S. 505, 509 (1973), the Court said:

"The guaranty against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guaranty, like the others, is a constitutional right of the criminal defendant, *its practical result is to prevent a trial from taking place at all*, rather than to proscribe procedural rules that govern the conduct of a trial."

---

[7] See also *United States v. Jorn*, 400 U.S. 470, 479 (1971).

The government's "parade of horribles," forecasting a flood of interlocutory appeals, rests on a faulty foundation and is without basis in law or in fact.

C. The Finality Rule as Applied to Double Jeopardy.

Because of the foregoing considerations, it is scarcely surprising that five of the six Circuits which have considered the jurisdictional question posed by this case have applied a "practical rather than a technical construction," as required by *Cohen* and *Eisen*, and have properly concluded that an order denying a double jeopardy motion is "final" and therefore appealable under § 1291.[8]

The seminal opinion of the Fourth Circuit in *United States v. Lansdown*, 460 F. 2d 164, 171 (4th Cir. 1972), observed that a double jeopardy appeal fits squarely within the tripartite test of *Cohen* because:

"First, defendant's right is under the fifth amendment and it is separable from, and collateral to, the main cause

---

[8] Cases so holding include:

Second Circuit: *United States v. Beckerman*, 516 F. 2d 905 (2d Cir. 1975).

Third Circuit: *United States v. Starks*, — F. 2d — (3d Cir. 1976); *United States v. DiSilvio*, 520 F. 2d 247 (3d Cir. 1975), *cert. denied*, — U.S. — (1975); *United States ex rel. Stewart v. Hewitt*, 517 F. 2d 993 (3d Cir. 1975); *United States ex rel. Webb v. Court of Common Pleas*, 516 F. 2d 1034 (3d Cir. 1975); *United States ex rel. Russo v. Superior Court*, 483 F. 2d 7 (3d Cir. 1973), *cert. denied*, 414 U.S. 1023 (1973).

Fourth Circuit: *United States v. MacDonald*, 531 F. 2d 196 (4th Cir. 1976); *United States v. Lansdown*, 460 F. 2d 164 (4th Cir. 1972).

Sixth Circuit: *Thomas v. Beasley*, 491 F. 2d 507 (6th Cir. 1974), *cert. denied*, 417 U.S. 955 (1974).

Eighth Circuit: *United States v. Barket*, 530 F. 2d 181 (8th Cir. 1975).

Contra, Fifth Circuit: *United States v. Bailey*, 512 F. 2d 833 (5th Cir. 1975); *Gilmore v. United States*, 264 F. 2d 44 (5th Cir. 1959).

of action which is whether he is innocent or guilty of the crimes charged. Second, the right claimed is a constitutional one and, as such, it is too important to be denied review. Finally, if review is not had now, the right claimed—to be free from being twice forced to stand trial for the same offense—will be irreparably lost."

The lone dissenting view on this subject has been voiced by the Fifth Circuit. In *United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975), that court held, as the government has urged in all of these cases, that the right to be free from a second trial can be effectively vindicated by a reversal of any conviction which might be obtained. Such a view misconceives the nature of the double jeopardy protection and seriously underestimates the "heavy personal strain" which is a necessary concomitant of any criminal prosecution.[9]

The Fourth Circuit's rejection of this reasoning in *Lansdown*, *l.c.* 171, is hard to improve on:

---

[9] *Amicus'* own case is a graphic example of the abuses which the double jeopardy clause was designed to prevent. *Amicus* has been subjected to four charges in connection with the United States Attorney's investigation of so-called "political corruption" in the State of Missouri. An earlier case was dismissed by the district judge for prosecutorial misconduct and pre-indictment delay, and that dismissal was upheld by the Eighth Circuit. *United States v. Barket*, 530 F. 2d 189 (8th Cir. 1976). The evidence in that case showed that the United States Attorney used the indictment process as a pressure tool to extract information from defendant and repeatedly leaked grand jury data to the news media. His methods were also criticized by the Court of Appeals in another case arising out of the same investigation. *United States v. Lasater*, — F. 2d — (8th Cir. 1976).

As in the previous case, the U.S. Attorney pyramided the charges against *amicus* in order to maximize the pressure. *Amicus* was forced to endure the ordeal of one trial after the government had "elected" to try the § 656 charge against him. All counsel acknowledged that the "election" was final and precluded any further prosecution in the case of acquittal. Yet now the United States Attorney seeks to subject *amicus* to the strain of still another trial using the same evidence, merely by changing the name of the crime. Such tactics cry out for meaningful enforcement of the double jeopardy clause.

"This argument is based upon a lack of appreciation of the true nature of the objectives of the guarantee against double jeopardy. *The double jeopardy 'prohibition is not against being twice punished, but against being twice put in jeopardy.'* . . . Indeed, the Supreme Court has stated that the 'underlying idea' of the double jeopardy clause is that the 'State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to *embarrassment, expense* and *ordeal* and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' . . . Even if an appellate court reverses the conviction in a second trial on the grounds of double jeopardy, a defendant has still not been afforded the full protection of the fifth amendment since he has been subjected to the embarrassment, expense, anxiety and insecurity involved in the second trial. *If an individual is to be provided the full protection of the double jeopardy clause, a final determination of whether jeopardy has attached to the previous trial must, where possible, be determined prior to any retrial.*"

This Court, too, has twice recently recognized the finality of pre-trial double jeopardy determinations and has reviewed them on the merits. In *Harris v. Washington*, 404 U.S. 55 (1971), the Court summarily reversed an order of the Washington Supreme Court authorizing a retrial of the petitioner following his acquittal in the first trial. An essential element of the second prosecution had been resolved adversely to the State in the first case, and hence a retrial was forbidden by the collateral estoppel doctrine articulated in *Ashe v. Swenson*, *supra*. As for the finality of the order denying the petitioner's motion, the Court stated, *l.c.* 56:

"Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the peti-

tioner, a claim separate and apart from the question of whether the petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. §1257." (Emphasis by the Court.)[10]

In *Turner v. Arkansas*, 407 U.S. 366 (1972), the Court, in another summary *per curiam* opinion, reversed the judgment of the Arkansas Supreme Court permitting the petitioner to be retried for robbery after he had already been acquitted of murder in connection with the robbery. The petition was considered on the merits, and the case was adjudged to be "squarely controlled by *Ashe v. Swenson*."[11]

Harris and *Turner* correctly determined that the denial of a double jeopardy motion is a "final" order for the obvious reason that an erroneous rejection of a double jeopardy plea by the trial court, which authorizes the retrial, cannot be cured by a post-trial appeal. By any standard, then, the order of the district court in the instant case was final and the Court of Appeals had jurisdiction to entertain the petitioners' double jeopardy claim.

---

[10] To the extent that *Rankin v. State*, 11 Wall. 380 (1870) is to the contrary, it has been at least implicitly overruled by such intervening decisions as *Cohen*, *Harris* and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

[11] The *Turner* case is virtually identical to *Barket* because in both cases the prosecution stipulated that it intended to use the very same evidence in the second trial.

CONCLUSION

Although the prohibition against piecemeal review of criminal cases is well founded, the fifth amendment's concern about successive and repetitive prosecutions weighs heavier on the *Dickinson* scales of justice. A criminal defendant who has once been forced down the "gauntlet" must be permitted to challenge the propriety of a second ordeal before being forced to endure it. Once the second trial begins, his constitutional rights have been irretrievably and "finally" lost.

Respectfully submitted,

VERYL L. RIDDLE

THOMAS C. WALSH

ROBERT F. SCOULAR
500 North Broadway
St. Louis, Missouri 63102
Attorneys for *Amicus Curiae*

BRYAN, CAVE, McPHEETERS &
McROBERTS
LEVY & CRAIG
Of Counsel

July, 1976